CHIAT KIAN RUBBER WORKS SDN. BHD.

v.

SOUTHERN FINANCE CO. BHD. & ANOR.

HIGH COURT MALAYA, SHAH ALAM
MAHADEV SHANKAR J
[ORIGINATING MOTION NO. 21-42-91]
19 MARCH 1991

LAND LAW: *Charge - Order for sale - Application to vary order - Reserve price - Auction - Delay - No timeous action by the chargor to postpone auction - Verbal refusal by Collector to vary order - Position of Collector once order made - Power to postpone sale - Power to vary reserve price - Whether consequential order - Distinction between the Court's power to alter price first fixed and Collector's capacity to do so - Close parallels between ss. 25, 263 of the NLC - Procedure for application under s. 418 of the NLC and RHC O. 55 r. 13 - Powers of the Court under s. 417 - Specific relief granted on equitable principles - NLC 1965, ss. 256, 263, 417, 418 - RHC 1980, O. 55 r. 13.*

This originating summons was for an order to vary the reserve price of land to be auctioned on the 25 February 1991 from RM600,000 to RM1,950,000 and also for a further order that the said auction be stayed and postponed to a date thought fit by the Court. The land in question belongs to the appellant (chargor). By way of presumption contained in s. 114(e) of the Evidence Act 1950, the Court inferred that the chargor had defaulted and that the chargee had applied for an order for sale of the said land under s. 260 of the National Land Code (the NLC), and that the provisions of ss. 261 and 262 of the NLC were complied with resulting in an order for sale under s. 263 of the NLC some time prior to 29 August 1990.

The forced sale value of the property was with wide disparity fixed at RM1,400,000, RM2,020,000 and RM1,950,000 respectively. No appeal was filed against the Collector's order fixing the reserve price at RM600,000 as provided for under s. 418 of the NLC. Chargor's solicitors were unable to get earlier intimation of the date of the postponed auction. On 21 February 1991 the chargor's solicitors wrote to the Collector asking for an increase of the reserve price and a postponement of the sale.

Held:

[1] It is settled law that once the Collector has made his order under s. 263 he is *functus officio* and he can only postpone the sale. The power to postpone is discretionary and the Courts will only interfere with its exercise in exceptional cases.

[2] The appeal against the reserve price of RM600,000 should have been preferred within three months thereof. The procedure is prescribed by O. 55 r. 13 of the Rules of the High Court 1980.

[3] Admittedly these proceedings are instituted under s. 418 of the NLC and described as a notice of motion with the applicant described as an appellant. But the real issue, if there was one, was against the Collector's verbal refusal on 21 February 1991 to vary the reserve price from RM600,000 to RM1,950,000 and postpone the sale fixed to take place four days later on 25 February 1991.

[4] In the interests of justice the Court had to consider whether the Collector's refusal amounted to a denial of justice. It did not because the Collector had no jurisdiction to vary his order, and there is no material whatsoever before the Court to suggest that his discretion not to postpone the sale was improperly exercised.

[5] The power conferred upon the Court by s. 417 of the NLC to intervene in an appropriate case is akin to specific relief which is granted on equitable principles. The circumstances of this case do not entitle the chargor to any relief under this section either.

[Application dismissed.]

Cases referred to:

Ng Tiou Hong v. Collector of Land Revenue, Gombak [1984] 2 MLJ 37 ***(cons)***
Eu Finance Bhd. v. Lim Yoke Foo [1982] 2 MLJ 37 ***(foll)***
Lim Yoke Foo v. Eu Finance Bhd. [1985] 1 MLJ 17 ***(foll)***
Eu Finance Bhd. v. Sim Sen Organisation Bhd. [1990] 1 MLJ 357 ***(dist)***
Malayan United Finance Bhd. v. Adsonii (M) Sdn. Bhd. [1990] 2 CLJ (Rep) 435 ***(dist)***
Pacific Bank Bhd. v. Wong Kum Meng @ Wong Kim Fook [1990] 1 CLJ (Rep) 447 ***(dist)***

Legislation referred to:

Evidence Act 1950, s. 114 illus.(e)
National Land Code 1965, ss. 256, 260, 261, 262, 263, (2)(d), 417, 418
Rules of the High Court 1980, O. 55 r. 13

For the claimant - Hj. Sulaiman Abdullah (Mohd. Illiayas & Rathu Kesavam with him); M/s. Zain & Co.

JUDGMENT

Mahadev Shankar J:

This originating summons seeks for an order to vary the reserve price of land to be auctioned on 25 February 1991 from RM600,000 to RM1,950,000 and for a further order that the said auction be stayed and postponed to a date thought fit by this Court.

The land in question is in Kapar Klang. It belongs to the appellant in this case (hereinafter referred to as the chargor). On 26 September 1985 the land was charged to the 1st respondent (the chargee).

In the absence of relevant information which ought to have been provided by the chargor, I have inferred by way of the presumption contained in s. 114(e) of the Evidence Act 1950 that the chargor defaulted, that the chargee applied for an order for sale of the land under s. 260, of the National Land Code (the NLC), and that the provisions of ss. 261 and 262 of the Code were then complied with resulting in an order for sale under s. 263 of the Code, some time prior to 29 August 1990.

This must be so because when the reserve price under s. 263(2)(d) was fixed at RM600,000 the date on which the sale should be held was fixed for 29 August 1990.

The chargor's managing director is one Lim Swee Lin . Before 28 August 1990 it is clear he had knowledge of three valuation reports of the said land dated 23 March 1990, 9 April 1990 and 14 April 1990 each to the effect that the forced sale value of the land was RM1,400,000, RM2,020,000 and RM1,950,000, respectively. (Such wide disparities by these valuers does little to add to their professional credibility and reinforces the remarks of the Supreme Court as to the weight to be given to them - see Syed Agil Barakbah FJ in *Ng Tiou Hong v. Collector of Land Revenue, Gombak* [1984] 2 MLJ 37).

No appeal was ever filed as provided by s. 418 of the NLC against the Collector's order fixing the reserve price at RM600,000. Nor was any timeous action was taken by the chargor either at or about the time the valuation reports aforesaid were available.

By August 1990 the chargor was legally represented. But the solicitors were instructed to obtain a postponement of the sale fixed for 29 August 1990. This they did one day before that is 28 August 1990 when they requested and obtained the Collector's consent to postpone the sale for three months because the chargor wished to try and sell the land by private treaty. In the confirmatory letter sent by the solicitors the same day the three valuation reports were sent to the Collector. There is no evidence before me that this was done with a view to getting the reserve price amended before the postponed sale could take place on 25 February 1991.

It is not clear to the Court why the chargor's solicitors were unable to get earlier intimation of the date of the postponed auction. The chargee knew about it and sent a letter dated 7 February 1991 to the chargor c/o their solicitors with carbon copies to Lim Swee Lim , his company and another guarantor. The solicitors say they received their copy of this letter on 19 February 1991.

On 21 February 1991 the chargor's solicitors wrote to the collector asking him to increase the reserve price and postpone the sale. The Collector telephoned back the same day and indicated his refusal to do either.

So the chargor's solicitors concerned affirmed a supporting affidavit and filed the same with this originating summons on 22 February 1991.

I heard submissions on 23 February 1991 and dismissed the application for the reasons which now follow.

The position of the Collector once he has made his order under s. 263 has already been the subject of judicial decision in *Eu Finance Bhd. v. Lim Yoke Foo* [1982] 2 MLJ 37 (High Court) and the Privy Council in *Lim Yoke Foo v. Eu Finance Bhd.* [1985] 1 MLJ 17. Also in my judgment in *Oriental Bank Bhd. v. Pentadbir Tanah Daerah Segamat & Anor.* (J.B. High Court O.M. No. 17 of 1985 - unrep.) and in *MBF Finance Bhd. v. Pentadbir Tanah Daerah Gombak* by Dato' Wira Wan Yahya J.

It is settled law that once the Collector has made his order under s. 263 he is *functus officio* and he can only postpone the sale. The power to postpone is discretionary and the Courts will only interfere with its exercise in exceptional cases.

Applicant's Counsel Hj Sulaiman bin Abdullah cited *Eu Finance Bhd. v. Sim Sen Organisation Bhd.* [1990] 1 MLJ 357, *Malayan United Finance Bhd. v. Adsonii (M) Sdn. Bhd.* [1990] 2 CLJ (Rep) 435, and *Pacific Bank Bhd. v. Wong Kum Meng @ Wong Kim Fook* [1990] 1 CLJ (Rep) 447 in order to impress upon me that the power to postpone a sale impliedly carried with it a power to vary the reserve price because the latter was a consequential order.

These cases fall under s. 256 of the NLC where the Registrar of the High Court fixed the reserved price when the order for sale was first made. After the auction was postponed the reserved price was varied by the Court after a hearing *inter partes*, well before the postponed auction was to take place. The issue which arose before me therefore was that if the Court could alter the reserve price first fixed, why should the Collector not do the same?

Admittedly there are close parallels between s. 256 of the NLC where the High Court Registrar fixes the reserve price, and s. 263 where the Collector does so. But I regret that I have not been referred to any specific section in the Code not to any authority

where the Collector is empowered to vary an order of sale in this way. The remedy of a party aggrieved then is to appeal. The appeal against the reserve price of RM600,000 should have been preferred within three months thereof. That was manifestly not done in this case. The procedure is prescribed by O. 55 r. 13 of the Rules of the High Court 1980 which requires the appeal to be by way of motion supported by affidavit and served on the other parties.

Admittedly these proceedings are intituled under s. 418 of the NLC and described as a notice of motion with the applicant described as an appellant. But the real appeal if there was one was against the Collector's verbal refusal on 21 February 1991 to vary the reserve price from RM600,000 to RM1,950,000 and postpone the sale fixed to take place four days later on 25 February 1991.

In view of the time constraints it eventually became an *ex parte* application for a stay of proceedings which would effectively have stymied the sale. All I needed to do in the interests of justice was to consider whether the Collector's refusal amounted to a denial of justice. It did not because he had no jurisdiction to vary his order, and there is no material whatsoever before me to suggest that his discretion not to postpone the sale yet again was improperly exercised.

Consequently I dismissed this application but I feel constrained to make some other observations about this matter.

The same solicitor who had the conduct of this matter appeared in this Court recently on another application which was dismissed with costs and is the subject of my judgment in *Celtra Corporation Sdn. Bhd. v. Bank Bumiputra Malaysia Bhd.* It should have been apparent that the alleged urgency in this case was the result of a lack of diligence on the part of the chargor in taking the necessary steps at the earliest opportunity.

It is untoward to expect Collectors to accommodate requests for postponement which are made at the last minute especially when one adjournment has already been given as in this case. The power conferred upon the Court by s. 417 of the NLC to intervene in an appropriate case is akin to specific relief which is granted on equitable principles. The circumstances of this case do not entitle the chargor to any relief under this section either.

Also found at [1992] 1 CLJ 401